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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re:)
)
Request of Cellular Communications)
of Puerto Rico, Inc. to Hold an) RM-8897
Auction to License Cellular RSA)
No. 727A, Ceiba, Puerto Rico)

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DEC 10 1995

Federal Communications Commission
Office of Secretary

To: The Commission

REPLY COMMENTS OF CRYSTAL COMMUNICATIONS SYSTEMS

Crystal Communications Systems ("Crystal"), by its attorney, hereby replies to the comments filed in the above-captioned proceeding by Western Wireless Corporation ("WWC") and Bell Atlantic NYNEX Mobile, Inc. ("BANM"). The arguments advanced by WWC and BANM in support of the Petition for Declaratory Ruling filed by Cellular Communications of Puerto Rico ("CCPR") to change the method for awarding unissued cellular licenses from lottery to auction lack any support in law and are contrary to the public interest.

A. The Public Interest Arguments of BANM and WWC Are Based Entirely On Self-Interest

The Commission should recognize that the "public interest" arguments advanced by BANM and WWC are really calculated to serve their own narrow self-interest. Like CCPR, neither WWC nor BANM has an application pending for any of the cellular markets that remain to be licensed. Unless the rules are changed, neither can win a license for these markets. Thus, it is not surprising that none of their claims can withstand scrutiny.

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For example, the major incentive BANM and WWC offer for auctions is the money that they claim the government would receive. But is it credible that these parties would encourage the adoption of a policy that would actually cost them *more* money? Surely such altruism is rare and unexpected as a party appearing before Congress to urge that its taxes be raised, or that the IRS change its rules to eliminate the loopholes it enjoys. It is far more likely that if these parties really thought that auctions would produce the highest prices for the markets they intend to purchase, they would be advocating lotteries.

In reality, WWC and BANM recognize that it will cost far less money to purchase a license from the Commission at auction — particularly if they can manipulate the entry requirements to exclude most potential bidders — than it would to buy the same license from a private party that desires to build and operate a cellular system in the market.¹ As a practical matter, unless the Commission delays auctions for the remaining licenses until all litigation — including the instant proceeding — is resolved, a cloud will exist on any auctioned licenses. As WWC notes, such a cloud which would substantially reduce the prices bidders would be willing to pay.² Accordingly, in considering the comments of WWC and

¹ The assertion advanced by both WWC and BANM that the applicants in the remaining markets are speculators is insulting and baseless. Crystal, like many other winners of licenses in lotteries, operates a fully-developed cellular system. Notably, BANM does not characterize itself as a speculator, despite the fact that it obtained many of its cellular licenses through the lottery process.

² WWC 's request that the Commission not auction the licenses until the orders disqualifying the first selectee is final confirms this point: the bidding will be

BANM, the Commission should not be misled by empty promises made to seduce it to take action that will ultimately harm the public interest.

B. The Commission Lacks Authority To Use Auctions To Award The Unlicensed Markets

In their comments, Crystal and other opponents of the Petition have already explored the lack of legal authority for the change that CCPR has requested. Far from undermining the points made by Crystal and other opponents, the arguments made by WWC and BANM actually offer further evidence of the lack authority to use auctions. For example, BANM relies heavily on the Commission's move from comparative proceedings to lotteries in cellular markets 31-90 as supporting the Commission's authority to change the manner of awarding licenses in mid-stream. BANM Comments, 3-5. However, the distinctions between the situations actually demonstrate just how limited the Commission's power to effect such a change actually is.

In moving from hearings to lotteries, the Commission ***did not dismiss*** the pending applications in markets 31-90, as BANM would have the Commission do here. Nor did the Commission accept any ***new*** applications for those markets. Though it changed the manner of awarding licenses, the Commission protected the original applicant pool. Accordingly, *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987) does not stand for the Commission's power to run roughshod over the rights of pending applicants, as BANM would have it.

far less where the purchaser may be divested by the courts. WWC Comments, 8.

The recent decision in *McElroy Electronics Corp. V. FCC*, 86 F.3d 248 (D.C. Cir. 1996) is a far better test of how little the Commission can do to prejudice the rights of a pool of timely-filed applications. *McElroy* stand for the proposition that the original pool has a vested right to have the Commission select the licensee from that pool alone. Nothing in *Maxcell* offers any evidence to the contrary.

The limited changes the Commission implemented in moving from hearings to lotteries also indicative of how constrained its authority to change the mode of licensing actually is. Although BANM says nothing about this point, the Commission moved to lotteries only for some of the markets where it might have. It continued comparative hearings in all markets where hearings had already been designated (i.e., markets 1 through 30.) That is, the Commission did not attempt to change a process already in train — as is the case with respect to the remaining cellular markets — and implement a wholly new system. It made the change only where the prejudice to applicants could be minimized.³

BANM ignores a major difference in the authority given the Commission in implementing lotteries as opposed to the authority given to it with respect to auctions. The lottery legislation contained no provision cautioning it not to violate the rights of persons who had filed for comparative proceedings in good faith.

Finally, BANM ignores the huge difference in the prejudice that would be

³ Moreover, the Commission made a positive effort to minimize potential prejudice to applicants by giving them broad flexibility regarding partial settlement. In the end, very few lotteries were actually held in markets 31-90 in large part because of the Commission's efforts to encourage settlement.

wrought by imposition of auctions as opposed to lotteries. While applicants who had prepared well for a comparative hearing might lose some of the edge they had hoped to achieve in the licensing process in a change to lotteries, the overall effect of such a change was to make every applicant's mathematical chances equivalent. That is, no applicant had a worse chance of winning than any other applicant in a lottery, though it might no longer maintain its perceived (though unproven) advantage in a comparative hearing. In contrast, an auction system enhances the chances of large and wealthy applicants over other applicants. It is no accident that the parties which supported CCPR's Petition — BANM and WWC — are publicly traded companies whose financial resources would give them a substantial advantage in an auction over most competitors.

C. Contrary To The Views Of WWC And BANM, The Public Interest Does Not Equate To The Award Of Cellular Licenses To Large Companies

BANM and WWC would equate the public interest to the award of cellular licenses to large companies like themselves. Crystal does not believe that such a distorted self-serving view is worth much attention. Far more significant are the things that BANM and WWC would have the Commission sacrifice to achieve their self-serving ends.

WWC acknowledges that the Commission's highest priority should be granting permanent licenses in the remaining cellular markets. WWC Comments, 7-8. Yet use of auctions would only delay that process still more. Unlike re-lotteries, which have routinely been held prior to the final resolution of litigation

regarding the qualifications of a tentative selectee, auctions demand that all litigation be resolved first. As WWC states, a rational bidder cannot be expected to pay full value for a license subject to divestment. WWC Comments, 8-9. Thus, not only would a change to auctions not speed up the resolution of pending litigation, it would slow it to a crawl.⁴ The instant proceeding would have to be decided by the Commission and then reviewed by the courts before WWC would have clear licenses to bid on.

WWC would also have the Commission ignore the representations made by itself and other IOA holders not to participate in the permanent licensing of markets where they held such authorizations.⁵ To forget such a commitment and to ignore the commitment that the Commission itself made to protect the *Ashbacker* rights of the pending applicants can only cause the Commission discredit in the communications industry.

⁴ In its Comments, Crystal expressed grave concerns regarding the impact of the Commission's failure to exact a penalty on CCPR for its calculated violations of the ex parte rules. Crystal Comments 10-12. Crystal notes that like CCPR, WWC violated the ex parte rules in calling for the early resolution of the risk-sharing case. WWC Comments, 8 ("It is imperative the Commission issue a final decision regarding the disposition of the initial lottery winner's applications, currently under review as part of the Risk Sharing proceeding . . .") There is no indication that WWC has served any of the parties to those cases with its Comments.

⁵ BANM does not indicate whether it holds any IOAs. However, BANM also would not have been qualified to participate in Block A lotteries because it is a wireline carrier.

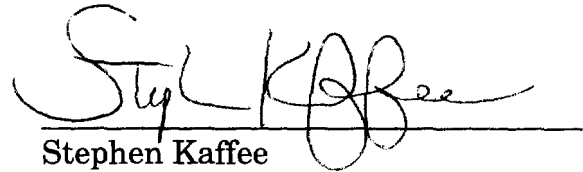
CONCLUSION

BANM and WWC attempting to manipulate the Commission into taking an action that would violate the law and have terrible public policy repercussions.

Respectfully submitted,

CRYSTAL COMMUNICATIONS SYSTEMS

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